

NO. 25681

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
SIAOSI MALUFAU, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 94-0880)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Siaosi Malufau (Malufau) appeals the "Order Denying Defendant's Non-Hearing Motion to Set Aside Illegal Sentence" filed February 11, 2003 in the Circuit Court of the First Circuit (circuit court).¹ Malufau filed his Motion to Set Aside Illegal Sentence pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 35.

Maluafu contends the circuit court violated his constitutional rights by sentencing him to an extended term of imprisonment without a jury determination, in violation of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000).

¹ The Honorable Dan T. Kochi presided.

Upon careful review of the record and the briefs submitted by the parties, we hold that Apprendi does not apply retroactively to this case because new rules for the conduct of criminal prosecutions as in Apprendi only apply retroactively to cases "pending on direct review or not yet final."² Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 716 (1987). A judgment becomes "final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." Caspari v. Bohlen, 510 U.S. 383, 390, 114 S. Ct. 948, 953 (1994). "Apprendi does not apply retroactively to cases on initial collateral review." United States v. Sanchez-Cervantes, 282 F.3d 664, 671 (2002).

Therefore,

IT IS HEREBY ORDERED that the "Order Denying Defendant's Non-Hearing Motion to Set Aside Illegal Sentence"

² The Judgment in Malufau's case was filed November 8, 1996. Malufau appealed. On August 25, 1998, by Summary Disposition Order, the Hawai'i Supreme Court affirmed Malufau's conviction and sentence on Counts I-IV and reversed his conviction and sentence on Count V.

filed on February 11, 2003 in the Circuit Court of the First
Circuit is affirmed.

DATED: Honolulu, Hawai'i, December 29, 2004.

On the briefs:

Siaosi Malufau,
defendant-appellant pro se.

Loren J. Thomas,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Chief Judge

Associate Judge

Associate Judge